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### Equal Protection, Supreme Court, New York County: Walter v. City of New York Police Department

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compared to *Penn Central*<sup>53</sup> demonstrates that the former parties were similarly situated and not provided equal protection of the law, while the Supreme Court indicated in *Penn* that the parties were not similarly situated because Grand Central Station is an historic landmark which is different from the building complex which was proposed to be built upon the New York landmark.<sup>54</sup> Equal protection must be afforded to similarly situated parties and the social classification in *Union College*, which did not involve a suspect classification, would be unconstitutional as applied under the Federal and New York State Constitution.

## SUPREME COURT

### NEW YORK COUNTY

Walter v. City of New York Police Department<sup>55</sup>  
(printed June 9, 1997)

Plaintiffs, applicants who had been excluded from the New York City Police Department Academy solely on the basis of their age, sought temporary and preliminary injunctive relief<sup>56</sup> challenging the New York City Administrative Code [hereinafter the "Code"] § 14-109 pursuant to § 296 of the Executive Law [hereinafter "Human Rights Law"] and § 8-107 of the Code.<sup>57</sup>

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<sup>53</sup> See *Union College*, 91 N.Y.2d at 167, 690 N.E.2d at 866, 667 N.Y.S.2d at 982. See also *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861 (1986).

<sup>54</sup> *Penn Central*, 438 U.S. at 118.

<sup>55</sup> N.Y. L.J., June 9, 1997, at 30 (Sup. Ct. New York County), *aff'd*, 664 N.Y.S.2d 21 (1st Dep't 1997).

<sup>56</sup> *Id.*

<sup>57</sup> NEW YORK CITY ADMINISTRATIVE CODE, § 8-107. This statute provides that:

It shall be an unlawful discriminatory practice: For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire

Plaintiffs also challenged § 14-109 pursuant to the New York State Constitution,<sup>58</sup> and the United States Constitution.<sup>59</sup> Plaintiffs further alleged a violation of due process under the New York State Constitution,<sup>60</sup> the United States Constitution,<sup>61</sup> and a violation of New York's Civil Practice Law and Rules [hereinafter "C.P.L.R."] Article 78.<sup>62</sup> The Supreme Court, New York County, rejected plaintiffs' allegations, upholding the long held policy that "age is a bona fide occupational qualification for the police officer position."<sup>63</sup> The court further found that the plaintiffs were unpersuasive in their claim of equal protection violation.<sup>64</sup> Plaintiffs "showed little probability of success on the

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or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms conditions or privileges of employment.

*Id.*

<sup>58</sup> N.Y. CONST. art I, § 11. Section Eleven of Article One provides: No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by firm, corporation, or institution, or by the state or any agency or subdivision of the state.

*Id.*

<sup>59</sup> U.S. CONST. amend. XIV. The Fourteenth Amendment states : "No state shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law." *Id.*

<sup>60</sup> N.Y. CONST. art. I, § 6. This section provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

<sup>61</sup> *Walter*, N.Y. L.J., June 9, 1997, at 30.

<sup>62</sup> *Id.* See N.Y. C.P.L.R. § 7801 (McKinney 1993) (stating "the substantive relief previously obtained by writs of certiorari to review, mandamus, or prohibition shall be obtained in a proceeding under Article 78.").

<sup>63</sup> *Walter*, N.Y. L.J., June 9, 1997, at 30. See also *Feimer v. Ward*, 127 Misc. 2d 853, 855, 487 N.Y.S.2d 458, 460 (Sup. Ct. New York County 1984); *Doyle v. Suffolk County*, 786 F.2d 523, 529 (2d Cir. 1986).

<sup>64</sup> *Walter*, N.Y. L.J., June 9, 1997, at 30.

merits or danger of irreparable injury.”<sup>65</sup> The court found that the “equities weighed in favor of the defendant,”<sup>66</sup> and denied the plaintiffs’ motion for preliminary injunctive relief.<sup>67</sup>

Plaintiffs, Karen Walter, Richard Chen and Michael Cusumano, brought this action on behalf of themselves and others “similarly situated.”<sup>68</sup> Plaintiffs were all 35 years of age or older and had responded to a notice for the civil service examination to qualify for an entry level position in the New York City Police Department.<sup>69</sup> The last day to file for this test was March 26, 1996,<sup>70</sup> with the written examination to take place on June 15, 1996.<sup>71</sup> On September 30, 1996, the United States Congress enacted a permanent exception to the Age Discrimination in Employment Act [hereinafter “A.D.E.A.”]<sup>72</sup> pertaining to law enforcement officers and firefighters.<sup>73</sup> With these exceptions to the A.D.E.A., the Federal Government approved and sanctioned the policy of age qualification for the position of police officer.<sup>74</sup> Despite this Act, plaintiffs were permitted to take the examination

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* See *W.T. Grant Co. v. Srogui*, 52 N.Y.2d 496, 517, 420 N.E.2d 953, 963, 438 N.Y.S.2d 761, 771 (1981).

<sup>67</sup> *Walter*, N.Y. L.J., June 9, 1997, at 30.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Plaintiffs had responded to Civil Service Examination No. 5177 seeking appointment to the New York Police Department as a police officer.  
*Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See 29 U.S.C. § 623 (j). This statute provides in relevant part:

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or interstate agency to fail or refuse to hire . . . any individual because of such individual’s age if such action is taken (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer . . . and the individual has attained (A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983.

*Id.*

<sup>73</sup> *Walter*, N.Y. L.J., June 9, 1997, at 30.

<sup>74</sup> *Id.*

on various dates between September, 1996 and March, 1997.<sup>75</sup> Following the written examination, plaintiffs were given further physical, character, psychological and medical examinations.<sup>76</sup> After passing these tests, plaintiffs were advised that they were qualified for the position of police officer,<sup>77</sup> and an Age Computation Sheet was given to each plaintiff.<sup>78</sup> This sheet, which recorded the date of birth of the applicants,<sup>79</sup> also contained the legend: "There is no maximum age requirement for police officers."<sup>80</sup> The names of the 18,470 candidates who passed the examination were placed on an eligibility list for appointment to the New York Police Department.<sup>81</sup>

The New York Police Department issued memoranda to its applicant processing personnel stating that "it has been determined that the Administrative Code § 14-109 will be applied when appointing candidates to the April 15, 1997 class."<sup>82</sup> Specifically, only candidates who were less than 35 years of age on March 26, 1996, the last day of filing for examination 5177, are to be appointed."<sup>83</sup> The affected applicants, including plaintiffs, were notified for the first time by oral communication from their inspectors that they were not to be considered for appointment, solely on account of their age on or about April 10 and 11, 1997.<sup>84</sup> From the eligibility list, 1,269 candidates were appointed<sup>85</sup> and sworn in on April 15, 1997,<sup>86</sup> and the plaintiffs were not among the appointees.<sup>87</sup> An additional 95 candidates

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

were appointed on April 23, 1997.<sup>88</sup> Once again, the plaintiffs were not among the appointees.<sup>89</sup>

On April 15, 1997, plaintiff's moved for an Order to Show Cause seeking temporary and permanent relief.<sup>90</sup> A temporary restraining order was issued,<sup>91</sup> barring defendant from continuing to exclude the 81 otherwise qualified candidates from entering the Police Academy on April 15, 1997 solely because those candidates were over the age of 34.<sup>92</sup> It further directed defendant to permit the "81 otherwise qualified candidates to enter the Police Academy and to participate in all New York Police Department Academy programming for prospective police officers on April 15, 1997; or, in the alternative, to reserve their positions in the April 15, 1997 class pending a resolution of this matter."<sup>93</sup> A notice of appeal was immediately served by the defendant.<sup>94</sup> On April 15, 1997, the Appellate Division, First Department, vacated the stay of the temporary restraining order.<sup>95</sup>

The court found that the Code was not unconstitutional, nor was it void on its face.<sup>96</sup> Additionally, while the Human Rights Law does establish "equality of opportunity as a civil right,"<sup>97</sup> the court recognized the exception to the age discrimination prohibition in the case of appointment of police officers.<sup>98</sup> Civil Service Law § 58 (1) prescribes the age limitations for police officers,<sup>99</sup> and the state courts have consistently upheld this

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* See *Petrelli v. N.Y.C. Personnel Dep't*, 158 A.D.2d 331, 551 N.Y.S.2d 19 (1st Dep't 1990); *Constantine v. White*, 166 A.D.2d 59, 63, 569 N.Y.S.2d 765, 767 (3d Dep't 1991); *Buffalo Municipal Civil Service Comm'n v. Mercado*, 233 A.D.2d 877, 878 (4th Dep't 1996).

<sup>99</sup> See *Feimer v. Ward*, 127 Misc. 2d 853, 855, 487 N.Y.S.2d 458, 461 (Sup. Ct. New York County 1984).

provision.<sup>100</sup> Civil Service Law § 54 allows the Civil Service Commission to adopt “reasonable minimum or maximum age requirements for positions such as policemen, firemen, prison guards or other positions which require extraordinary physical effort.”<sup>101</sup>

In *Feimer v. Ward*,<sup>102</sup> an applicant for the police department was similarly not considered because of his age.<sup>103</sup> The applicant alleged that the age requirement was discriminatory and a denial of equal protection due to preferential treatment given to veterans.<sup>104</sup> The court held that there was no violation of the applicant’s equal protection rights<sup>105</sup> as the age requirement was rationally related “to a legitimate governmental interest which is sought to be achieved.”<sup>106</sup> The *Feimer* court explained that when it comes to the treatment of veterans, such privileges “have long been upheld as constitutionally permissible, and are viewed as society’s expression of gratitude for the veterans’ sacrifice and the disruption of their lives by military service.”<sup>107</sup> The equal protection question was addressed in *Feimer v. Ward*,<sup>103</sup> where the court found that “the constitutional guarantee of equal protection of the law does not require that every individual be treated equally under a particular law . . . . If the classification has some ‘reasonable basis’, it does not offend the Constitution

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<sup>100</sup> *Walter*, N.Y. L.J., June 9, 1997, at 30. See *Feimer v. Ward*, 127 Misc. 2d 853, 487 N.Y.S.2d 458 (Sup. Ct. New York County 1984); *Doyle v. Suffolk County*, 786 F.2d 523 (2d Cir. 1986).

<sup>101</sup> See *Figueroa v. Bronstein*, 38 N.Y.2d 533, 535, 344 N.E.2d 402, 403, 381 N.Y.S.2d 470, 471 (1976) (citing N.Y. CIV. SERV. LAW, § 54) (McKinney 1993)).

<sup>102</sup> *Feimer*, 127 Misc. 2d at 853, 487 N.Y.S.2d at 460

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 854, 487 N.Y.S.2d at 460.

<sup>105</sup> *Id.* at 854, 487 N.Y.S.2d at 463.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 858, 487 N.Y.S.2d at 463.

<sup>103</sup> 127 Misc. 2d 853, 487 N.Y.S.2d 458 (Sup. Ct. New York County 1984).

because [it lacks] . . . mathematical nicety or because in practice it results in some inequality.”<sup>109</sup>

Where there is no fundamental right affected, the traditional equal protection test is used.<sup>110</sup> Under the rational basis test, it must be determined whether the classification is rational and whether a classification furthers a “proper governmental purpose.”<sup>111</sup> To be reasonable, there must be a “rational relationship between the classification and the government interest sought to be achieved.”<sup>112</sup> When an age limitation related to the ability of an applicant to perform the necessary tasks of a police officer,<sup>113</sup> it is “rationally related to the state interest to be served.”<sup>114</sup>

Similarly, in *Figueroa v. Bronstein*,<sup>115</sup> an applicant was disqualified as a correction officer candidate because he exceeded the age requirement.<sup>116</sup> Relying upon Article V, § 6 of the New York State Constitution the court held that the age limitation was permissible.<sup>117</sup> The court in *Figueroa* stated

Our Legislature by explicit provision of § 54 of the Civil Service Law has recognized the right of civil service commissions to adopt ‘reasonable minimum or maximum age requirements’ for open competitive examinations for positions such as policemen, firemen, prison guard, or other positions which require extraordinary physical effort, except where age limits for such positions are already prescribed by law.<sup>118</sup>

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<sup>109</sup> *Id.* at 854, 487 N.Y.S.2d 458, 460. See *Lindsley v. Natural Carbonic Gas C Co.*, 220 U.S. 61, 78 (1911); *Figueroa v. Bronstein*, 38 N.Y.2d 533, 535, 344 N.E.2d 402, 403, 381 N.Y.S.2d 470, 471 (1976).

<sup>110</sup> *Feimer*, 127 Misc. 2d at 854, 487 N.Y.S.2d at 460.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* See *Campagnola v. McGuire*, 88 A.D.2d 577, 451 N.Y.S.2d 397 (1st Dep’t 1982).

<sup>113</sup> *Feimer*, 127 Misc. 2d at 855, 487 N.Y.S.2d at 461.

<sup>114</sup> *Id.*

<sup>115</sup> 38 N.Y.2d 533, 344 N.E.2d 402, 38 N.Y.S.2d 470 (1976).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 535, 344 N.E.2d at 403, 38 N.Y.S.2d at 471.



The *Figueroa* court held that an age requirement for correction officer candidates was reasonable and viable.<sup>119</sup>

In *Knapp v. Monroe County Civil Service Commission*,<sup>120</sup> the plaintiff alleged that there was a conflict between the Civil Service Law and the Human Rights Law,<sup>121</sup> contending that the Human Rights Law should control as it imposes a greater obligation.<sup>122</sup> The court disagreed with this claim, holding that there was no incongruity<sup>123</sup> because the Human Rights Law governs employers, employment agencies, labor organizations or licensing agencies<sup>124</sup> while the Civil Service Law governs state civil service departments and municipal commissions.<sup>125</sup> As there are two separate and unrelated classifications, there was no conflict.<sup>126</sup> Further, § 54 of the Civil Service Law bars “age discrimination in State civil service departments and municipal and State civil service commissions.”<sup>127</sup> The Legislature, attuned to this proviso, included an exception which permits age limitations for applicants for the police department.<sup>128</sup>

Where the Legislature has enacted a provision prohibiting age discrimination specifically tailored to Civil Service Law and has provided exceptions therein as part of the total scheme of that body of law, it can be assumed that it was that provision and not

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<sup>119</sup> *Id.*

<sup>120</sup> 77 A.D.2d 817, 437 N.Y.S.2d 136 (4th Dep’t 1980).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* See N.Y. EXEC. LAW § 296 (McKinney 1993). This section provides: “It shall be an unlawful discriminatory practice: for an employer to refuse to hire [due to] race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status.” *Id.*

<sup>125</sup> *Knapp*, 77 A.D.2d at 817, 437 N.Y.S.2d at 137. See N.Y. CIV. SERV. LAW § 54 (McKinney 1993). “Neither the state civil service department nor the state civil service commission, nor any municipal civil service commission shall prohibit, disqualify or discriminate against, any person who is physically or mentally qualified, from participating in a civil service examination.” *Id.*

<sup>126</sup> *Knapp*, 77 A.D.2d at 817, 437 N.Y.S.2d at 137.

<sup>127</sup> *Id.* at 817-18, 437 N.Y.S.2d at 137. See N.Y. CIV. SERV. LAW § 54. (McKinney 1993).

<sup>128</sup> *Knapp*, 77 A.D.2d at 818, 437 N.Y.S.2d at 137 See N.Y. CIV. SERV. LAW, § 58 (McKinney 1993).

the general provision from another body of law which the Legislature intended to apply to age discrimination violations involving agencies covered by the Civil Service Law.<sup>129</sup> The court in *Dounn v. Ross*<sup>130</sup> also held that “where the bar to employment is imposed by law, the provisions of the Human Rights Law are not applicable.”<sup>131</sup>

Also, in *Timerman v. Bence*,<sup>132</sup> appellant claimed that he was excluded from an eligibility list for the position of firefighter because he exceeded the age limitation.<sup>133</sup> The court, in ruling against appellant, held that “an age limitation will survive constitutional scrutiny if it bears a rational relationship to a legitimate governmental purpose.”<sup>134</sup> The court further held that it was rational to set an age limitation to ensure that the applicant will remain qualified for an appreciable period of time.<sup>135</sup> The Fourteenth Amendment of the Federal Constitution forbids states from denying equal protection of the laws to any person within their jurisdiction. This does not, however, prevent the states from creating rational classifications.<sup>136</sup> Since the issue in *Walter* did not involve a fundamental right or a suspect class, the rational basis standard of review was appropriate to determine if there was a violation of the equal protection clause.<sup>137</sup> “The adoption of maximum age limitations for public safety positions does not offend equal protection guarantees insofar as such limitations bear a rational relationship to a legitimate government purpose.”<sup>138</sup>

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<sup>129</sup> *Knapp*, 77 A.D.2d at 818, 437 N.Y.S.2d at 137.

<sup>130</sup> 71 A.D.2d 746, 419 N.Y.S.2d 253 (3d Dep’t 1979).

<sup>131</sup> *Id.* (quoting N.Y. CORRECT. LAW, § 751 (McKinney 1993)).

<sup>132</sup> 176 A.D.2d 1220, 576 N.Y.S.2d 714 (4th Dep’t 1991).

<sup>133</sup> *Id.* at 1221, 576 N.Y.S.2d at 715.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Feimer v. Ward*, 127 Misc. 2d 853, 854, 487 N.Y.S.2d 458, 460 (Sup. Ct. New York County 1984).

<sup>137</sup> *Walter v. City of New York Police Department*, N.Y. L.J. June 9, 1997, at 30 (Sup. Ct. New York County 1997).

<sup>138</sup> *Id.* (See *Figueroa v. Bronstein*, 38 N.Y.2d 533, 344 N.E.2d 402, 381 N.Y.S.2d 470 (1976); *Doyle v. Suffolk County*, 786 F.2d 523, 529 (2d Cir. 1996); *Timerman v. Bence*, 176 A.D.2d 1220, 576 N.Y.S.2d 714, 715 (4th Dep’t 1991); *Feimer v. Ward*, 127 Misc. 2d 853, 487 N.Y.S.2d 458 (Sup. Ct.

Thus, in this circumstance, age is a bona fide occupational qualification,<sup>139</sup> and the *Walter* court found no equal protection violations.<sup>140</sup>

The United States Congress enacted a “permanent exception to the Federal Age Discrimination In Employment Act as it pertains to law enforcement officers and firefighters” on September 30, 1996.<sup>141</sup> This legislation “further sanctions this jurisdiction’s long held policy that age is a bona fide occupational qualification for the police officer position.”<sup>142</sup>

The Fourteenth Amendment to the Federal Constitution forbids states from denying equal protection of the laws to any person within their jurisdiction,<sup>143</sup> and the New York State Constitution follows suit.<sup>144</sup> Generally, age discrimination is not permitted,<sup>145</sup> but there are specific provisos pertaining to police officers that permit age limitation.<sup>146</sup> The analysis used for both the Federal and State Constitutions applies a rational basis standard to determine if there is a reasonable basis in creating such a classification.<sup>147</sup> In addition, the classification must “further a proper government purpose.”<sup>148</sup> While an age limitation for police officer candidates may deny the opportunity for employment to those not of the requisite age, this burden is outweighed by the reasonable government interest.<sup>149</sup>

The holding in this case complies with federal and state precedent, as courts have consistently held that such age limitations do not subvert the constitutional rights afforded by

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New York County 1984); *Jubic v. City of Troy City Corp.*, 166 Misc. 2d 326, 633 N.Y.S.2d 720 (Sup. Ct. Rensselaer County 1995)).

<sup>139</sup> *Feimer*, 127 Misc. 2d at 855, 487 N.Y.S.2d at 460.

<sup>140</sup> *Walter*, N.Y. L.J., June 9, 1997 at 30.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> U.S. CONST. amend. XIV.

<sup>144</sup> N.Y. CONST. art. I, § 11.

<sup>145</sup> See N.Y. CIV. SERV. LAW § 54. (McKinney’s 1993).

<sup>146</sup> *Walter*, N.Y. L.J., June 9, 1997, at 30.

<sup>147</sup> *Feimer v. Ward*, 127 Misc. 2d 853, 854, 487 N.Y.S.2d 458, 460 (Sup. Ct. New York County 1984).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 855, 487 N.Y.S.2d at 461.

either the United States or New York State Constitutions.<sup>150</sup> Similar thresholds are in place to ensure the rights of citizens are protected. Due process is protected subject to a reasonable class creation and a legitimate government interest.<sup>96</sup>

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<sup>150</sup> *Id.*

<sup>152</sup> *Id.* at 854, 487 N.Y.S.2d at 460.